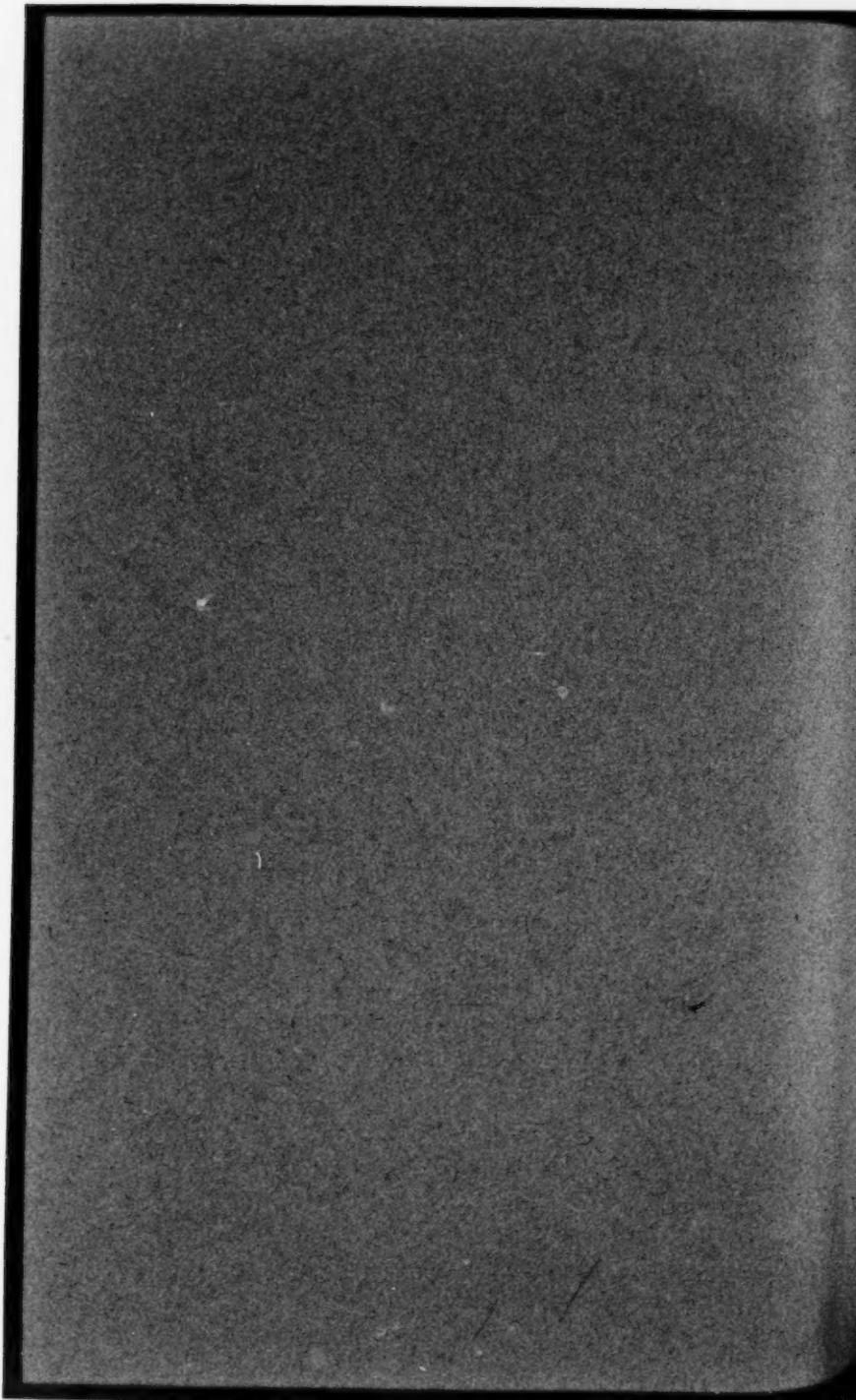

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Supreme Court of the United States

OCTOBER TERM 1944

NO. 345

THE NORTH SHORE CORPORATION,

Petitioner,

versus

ISADORE BARNETT, et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI [1]

I. HISTORY OF THE CASE

Petitioner's statement (pet. 1, 2) is accepted as correct as far as it goes. However, it will be helpful to point out the changes made in parties to this proceeding since the case first came before this Court, and why they were made. Due to the desire of both parties to shorten the record, record references are not available for the facts stated in the three paragraphs next succeeding, but these facts clearly

[1] As the petition for certiorari and supporting brief are filed as one document with pages consecutively numbered, reference to either the petition or brief will be indicated as "(pet.....)". Emphasis in quoted matter is supplied unless the contrary is indicated. In the District Court petitioner was defendant and respondents were plaintiffs; they will be thus referred to in this brief wherever convenient.

appear in the record of the District Court, and they will not be disputed by petitioner.

One of the plaintiffs in the suit as originally brought in the District Court was H. T. Overstreet, who for a stated period was bridge tender of the bridge crossing Sister's Creek, a part of petitioner's toll road. His only claim related to services as bridge tender. He was one of the three petitioners when the case first came to the attention of this Court (**Overstreet v. North Shore Corp.**, 317 U. S. 606; 318 U. S. 125).

Another of the plaintiffs was M. E. Nowlin. Nowlin sued in two capacities: first as bridge tender on Sister's Creek bridge, in succession to Overstreet; and second as toll collector. After the decision of this Court when the case was first presented here (318 U. S. 125), defendant, recognizing that there was no escape from the holding of this Court that the two bridge tenders were engaged in commerce, settled with Overstreet in full, and with Nowlin for his services as bridge tender (pet. 8). Based on this fact, it is petitioner's present contention that the bridge over Sister's Creek is definitely eliminated as a factor in determining whether plaintiffs were "engaged in commerce." Respondents disagree, and their position on this point will be developed below (infra, p 3).

In the case as originally brought, Bayshore Water & Light Company, a subsidiary of petitioner, was its co-defendant. Upon remand of the case to the District Court for trial it developed that all of the wages of petitioners who rendered services to Bayshore's telephone line were actually paid by The North Shore Corporation (R. 328). Accordingly, in the second amended complaint upon which the case was tried (R. 1), Bayshore was omitted as a party defendant.

II. STATEMENT OF THE CASE

Under this caption we shall deal with the facts relating to the flow of commerce over the road and telephone line. Reference will be made as needed to the two separate statements of fact made by petitioner, the first in the petition itself (pp. 2-6), the second in its brief (pp. 15-20).

Petitioner's description of the location of the toll road (p. 3) may be accepted as correct, and the road is correctly indicated on the map reproduced as Appendix "A" to the petition (following p. 37).

The proofs show the following with reference to the road and telephone line as instrumentalities of interstate commerce:

(1) Commerce moving on the intracoastal canal spanned by the drawbridge over Sister's Creek. Petitioner admits that at all times involved in this suit a substantial amount of interstate commerce passed under the Sister's Creek drawbridge, which was constantly raised and lowered to permit its passage, but seeks to exclude it from consideration, because the claims of Overstreet and Nowlin, the only two bridge tenders who were plaintiffs, have been settled in full (pet. 8).

That is entirely beside the mark. The drawbridge is an integral part of the road itself, as this Court recognized when the case first came before it for consideration (**Overstreet case,** 318 U. S. 125,130). As there stated, the road could not be operated without the drawbridge, and the bridge was necessary to the movement of commerce passing along the canal. The drawbridge still remains as a necessary instrumentality of commerce. It could not be maintained or operated as such were it not for the continuing services of the other plaintiffs—the toll collectors whose labors provided money for maintenance of the bridge, and

the maintenance crew who repaired the bridge (ibid, 130). This condition still prevails, notwithstanding the fact that there is no drawbrdge tender who is now a party plaintiff.

(2) The regular transportation of mails. Petitioner concedes (p. 4) that the mail carrier collects and delivers U. S. mail regularly over the road once a day six days a week, serving Fort George Island (population 1940, 98, plus seasonally the members and guests of the two clubs on the Island), Dame's Point and New Berlin township (population 1940, 584) (R. 327, 328). The Court will take judicial notice of the fact that mail sent to and by these communities must necessarily include a substantial number of communications to and from states other than Florida.

(3) Telephone and telegraph messages. Plaintiff Booth, maintenance foreman, and his crew, plaintiffs Lang, Barnett, Brazle, Lang, Jr., and Harris, maintained until June 3, 1941 the telephone line owned by Bayshore Water & Light, among their other duties. The remaining plaintiffs were toll collectors who as part of their duties, transmitted and received telephone and telegraph messages. All such services were paid for by the defendant (R. 328-330) up to March 31, 1942.

Neither plaintiffs nor defendant found it possible to obtain anything approaching complete figures on this traffic, but the District Court found that throughout the period there was a flow of interstate messages "sufficiently constant to be neither occasional nor accidental" (R. 329).

(4) The travel of out-of-state members and guests to and from the clubs on Fort George Island. Available figures on this subject are tabulated in the District Judge's findings (R. 326), and they are undisputed (pet. 16).

(5) Miscellaneous travel over the road by motor. Figures are available compiled from the toll keepers' daily rec-

ords, showing the total volume of motor traffic over the road for the years 1940, 1941, 1942, (R. 64, 65) viz:

1940—43,424
1941—56,384
1942—41,381.

These figures petitioner correctly states (pp. 6, 18) but the tabulation made on p. 18 for "interstate traffic" for those years, both including and excluding the transportation of mail by the mail carriers, are wholly misleading, being based solely on the traffic to and from the clubs and fishing camps, plus (in the second tabulation) the trips of the mail carriers. Petitioner omits entirely to take into account the steady flow of traffic by passenger cars travelling interstate over the road for purposes of recreation, sight-seeing, etc. This same error is found in the percentage computation included in petitioner's "Questions Presented" (p. 6).

Except for a very short period during the year 1943 immediately preceding the trial (R. 327) there are no records as to the numbers of cars bearing foreign licenses traversing the road. We readily concede that not every car bearing a foreign license tag must be assumed to be travelling in interstate commerce, but ordinary human experience amply warrants the conclusion that a considerable number of such cars are engaged in making interstate journeys, particularly as here where the road is located so close to the Georgia state line, and leads immediately off of U. S. Highway No. 17, a main artery of travel from Florida to New York and other eastern points. Several of the toll collectors testified that in some instances they could tell from the questions asked at the toll gate that the cars were travelling interstate (e. g. Pereira, R. 89, 90). Another factor to be considered in this connection, is that petitioner made a practice of advertising the attractions of

the road by pamphlets placed with the Jacksonville Tourist Bureau (R. 234, 235).

Considering all of these factors, the trial judge permitted witnesses for the plaintiffs and defendant to give their estimates based on personal observation as to the percentage of cars bearing foreign license tags traversing the road since the enactment of the Fair Labor Standards Act in 1938. As might be expected, there was a wide discrepancy between the testimony of plaintiffs' witnesses and that of defendant's witnesses, the former estimating the percentage of cars bearing foreign licenses at from 20% to 33 1/3% of the total, while defendant's witnesses estimated at from 5% to 8% (R. 353).

The trial judge found the evidence on this point "extremely unsatisfactory" (R. 327), but undoubtedly a substantial proportion of such cars were travelling interstate. If for the sake of argument the 8% maximum suggested by defendant's witnesses (pet. 20) be used as the basis for computing the number of foreign licenses, then the number of such cars for the three years 1940-1942 inclusive would run to well over 11,000; and if only 25% of the foreign licenses represented interstate journeys, the number of such journeys for the three year period would run to nearly 3000. A fortiori, if the lowest estimate of plaintiff's witnesses (20%) be accepted as showing the number of foreign licenses, then the total number of foreign licenses for the three year period exceeds 28,000, and 25% of that would exceed 7000. The effect of this is to destroy completely the value of Question 1 (pet. 6) and of the tabulation found on p. 18 of the petition.

III. THE QUESTIONS PRESENTED

We think petitioner's "The Questions Presented" (pp. 6, 7) should be entirely restated in the light of the history of the case and the facts showing the commerce on the road. Petitioner's first question is bad because it incorrectly states the percentage of traffic that is interstate. The second question is bad because the question of congressional power to make the regulation is frivolous.

As we see it, there are in this case two questions of law and one of fact.

Question 1: Is this case one which calls for a **second exercise by this Court** of its discretionary power to issue writs of certiorari? If this question is answered in the negative, as we believe it will be, there is no need to go farther.

Question 2: If, contrary to our expectation, the court is in doubt as to Question 1, there arises the second question: How much interstate traffic is shown by direct proof or fair inference to flow over petitioner's toll road? And

Question 3: Is that volume of interstate traffic legally sufficient to show that respondents, plaintiffs below, were "engaged in commerce" within the meaning of the Fair Labor Standards Act?

IV. ARGUMENT

A. There is No Reason why this Court Should Exercise for the Second Time in this Case its Discretionary Right of Review by Certiorari.

As shown by petitioner's "HISTORY OF THE CASE" (pet. 1, 2), this case has already been before this Court on certiorari as **Overstreet** v. **North Shore Corp.**, 318 U. S. 125, granted on petition of plaintiffs below, respondents now.

Not only does that fact present no reason why the writ should not a second time be granted; it offers the best of reasons why the present application should be denied—that this Court's decision in 318 U. S. 125 settled every point that is important from the standpoint of the **public interest**, leaving for determination under writ of certiorari only **a private controversy** between the parties litigant.

Certiorari was granted on the petition of the present respondents because of "the important question raised as to the coverage of the Act", (318 U. S. 127). Now, what was decided in the first opinion?

(1) That the phrase "engaged in commerce" as used in the Act stands unaffected by "the policy of congressional abnegation with respect to occupations affecting commerce"; that is to say, that the refusal of Congress to cover employees whose activities merely **affected** the "production of goods for commerce" is no reason for limiting the definition of those **"engaged in commerce"**; that in determining what constitutes "commerce" or "engaged in commerce", the Court is guided by "practical considerations" (318 U. S. 128).

(2) That the phrase "engaged in commerce" as used in the Fair Labor Standards Act is **in pari materia** with the like phrase used in the Federal Employers' Liability Act,

and is governed by the case of **Pedersen -v- Del. L. & W. R. Co.**, 229 U. S. 146, in which it was held that an employee injured while carrying bolts to be used in repairing a railroad bridge over which interstate trains passed, was "engaged in commerce" because

> ". . . the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and legal contemplation a part of it." (Citing numerous cases) (318 U. S. 129) (2)

(3) "Vehicular roads and bridges are as indispensable to interstate movement of persons and goods as railroad tracks and bridges are to interstate transportation by rail." (318 U. S. 129).

(4) "Without the services of Brazle (a maintenance repair employee) the facilities would fall into disrepair, and both the operation and maintenance would seem to depend upon Garvin's (a toll collector) collecting the tolls from the users of the structures. The work of each petitioner in providing a means of interstate transportation and communication is so intimately related to interstate commerce 'as to be in practice and legal contemplation a part of it' (**Pedersen's** case, supra), and justifies regarding petitioners as 'engaged in commerce' within the meaning of the Fair Labor Standards Act." (318 U. S. 130).

(5) It is the nature of the employees' activities, not the employer's, which governs coverage under the Act, and cases such as **Henderson Bridge Co. v. Kentucky**, 166 U. S. 150, and **Detroit International Bridge Co. -v- Corp. Tax Appeal Bd.**, 294 U. S. 83, dealing with the status of bridge

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(2) As pointed out by **L. Hand, J.**, in **Miller -v- Central R. of N. J.**, 58 F. (2d) 635, 637, the doctrine of the **Pedersen** case has never been modified by the many later cases which have sought to refine the definition of "engaged in commerce" as used in the federal Employers' Liability Act.

companies with respect to payment of state franchise taxes, upon which the complaint was dismissed by the lower courts, are without application. (318 U. S. 131, 132).

These are the essential points upon which the Court reversed the two lower courts, and held that the complaint stated a cause of action, and they covered every feature of the case which is of consequence to the public at large, or to the Administrator of the Wage and Hour Division of the Department of Labor.

Petitioner has no additional point to offer except the question whether the quantum of interstate commerce moving over defendant's road and telephone facilities is sufficient to classify respondents as "engaged in commerce", to which question it devotes, in varying form, the major portion of its brief (pet. 22-33).

The answer to that is that this Court, when the case first came before it, did not decide that **the volume** of interstate commerce was material, but only **the fact of its existence.**

> "The **precise question** is whether petitioners who are engaged in maintaining or operating a toll road and a drawbridge over a navigable waterway which together constitute a medium for the interstate movement of goods and persons are 'engaged in commerce' within the meaning of Secs. 6 and 7 of the Act." (318 U. S. 126).

Nowhere does this Court condition its opinion upon the volume of interstate commerce passing over the road, any more than did the **Pedersen** case, supra, and the numerous cases which follow it condition coverage under the Employers' Liability Act by the amount of interstate commerce passing over the railroad facilities served. As stated by

the Circuit Court in the instant case, in this very connection (R. 353, 354):

> "We do not find, however, that the court rested its holding upon the alleged **extensive** use; we think a careful reading of the opinion justifies the view that the holding is based upon the fact of interstate use rather than upon the extent of such use."

Following this excerpt, the Circuit Court pointed out (R. 354, note 4) that in **McLeod -v- Threlkeld**, 319 U. S. 491, where this Court cited its opinion in the **Overstreet** case, the majority and the minority of the Court were in harmony in interpreting the decision in the **Overstreet** case as made without reference to the quantum of interstate commerce.

In Rule 38 (5) this Court has indicated by illustration the "special and important reasons" for granting the writ of certiorari. None of these reasons fits the case which petitioner now presents, and while it is conceded that the Court has not limited its discretion by the promulgation of the rule, yet the rule does cover the overwhelming majority of all cases in which the writ has been granted.

At page 11 petitioner suggests that there is "a conflict in the applicable decisions of the Circuit Court of Appeals, even in the decisions of the Circuit Court of Appeals for the Fifth Circuit." No basis for that statement is shown in the brief or exists in fact. It can only be inferred that petitioner makes the statement on the basis of cases decided under the "production of goods for commerce" classification. Such decisions are without application to coverage under the "engaged in commerce" clause, as pointed out by this Court when this case first came up (318 U. S. 128).

In view of the thoroughness with which this Court covered the questions before it on the earlier petition for certiorari, there remain for consideration only three questions advanced by the present petition:

(1) Whether the statute, if construed as it was construed by the District and Circuit Courts in this case, would be unconstitutional (pet. 33-36). Under Point "C" of this brief this question will be shown to be entirely lacking in substance.

(2) Whether the decision of the Circuit Court of Appeals in this case is "probably in conflict with applicable decisions of this Court" (pet. 11-14). Here petitioner relies upon **Walling** -v- **Jacksonville Paper Co.**, 317 U. S. 564, 572, which held that if a "substantial part" of an employee's activities related to goods moving in interstate commerce, he is covered by the Act.

The inapplicability of the **Jacksonville Paper** case is fully demonstrated in the opinion of the Circuit Court (R. 354-355), where it is pointed out that the law as laid down in the **Jacksonville Paper** case is applicable to cases dealing with employees whose duties relate in part to interstate shipments, and not to those having to do with maintenance or operation of instrumentalities of commerce. The Circuit Court then goes on to say (R. 354-355):

> "Employees in the first class engaged during the same work-week in activities strictly interstate in character and in activities strictly intrastate in character. Employees in the second class of cases, as here, engaged in the same type of activities throughout each work-week. In the case before us the appellees are not concerned with goods or persons moving between two or more states by means of instrumentalities of interstate and intrastate transportation. They are concerned (1) in maintaining an instrumentality of transportation over which goods and persons in interstate and intrastate movements alike are being transported, and (2) in maintaining and operating an instrumentality of communication over which messages and telegrams in interstate and intrastate transactions alike are being transmitted.

> 'A track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being in interstate commerce' **Pedersen** -v- **Delaware, Lack. & West. R. R. Co.,** 229 U. S. 152."

(3) Whether the interstate commerce moving over the road is so small as to fall under the doctrine of "de minimis" (pet. 7-11; 22-33).

From a factual standpoint this question has been fully dealt with in our "STATEMENT OF THE CASE", supra, where it is shown that there was a regular movement of motor traffic over the road throughout the period involved. Legal aspects of the question are dealt with under Point "B" immediately following this section of our brief.

Here it is enough to note that the determination of the volume of interstate commerce moving over the road cannot be accomplished without weighing the evidence adduced before the District Judge, who in this case acted as both judge and jury (R. 72). That evidence, insofar as it concerns miscellaneous travel in interstate commerce of cars bearing foreign licenses, is conflicting. Certiorari will not be granted to review disputed questions of evidence. **U. S. -v- Johnston,** 268 U. S. 220, 227.

The right to issue writs of certiorari is to be sparingly exercised, in the public interest only, and not where only matters of private interest are involved.

Forsyth -v- **Hammond,** 166 U. S. 506, 514.
Re: Lau Ow Bew, 141 U. S. 583, 387.
American Cons. Co. -v- **Jacksonville T. & K. W. R. Co.** 148 U. S. 372, 383.

The record of certiorari granted and denied since the Act of 1925 is ample proof of the fact that the policy of the court has not changed since the 1925 amendment was enacted.

The case at bar certainly presents no reason for granting the writ.

B: The Volume of Interstate Commerce over Petitioner's Road is Ample to Warrant the Classification of Respondents as within the Coverage of the Act.

The basic facts as to interstate commerce passing over petitioner's toll road have been fully developed under the caption "STATEMENT OF THE CASE", supra. We deal here with certain conclusions which petitioner attempts to draw from those facts.

(1) Petitioner contends (pp. 8, 9) that if the Circuit Court's decision stands it would bring under the Act all those employed in maintenance of streets, roads and sidewalks in every village and hamlet in the nation, and "thousands of private ways" as well. This sweeping result is merely a spectre summoned by petitioner's pessimistic imagination.

Insofar as such persons are employed by public bodies, they are excluded from coverage by the definition of the word "employer" in the Act (U. S. C. Tit. 29, Sec. 203 (d)) as pointed out in Mr. Justice Murphy's opinion (318 U. S. 130). If privately employed, their connection with interstate commerce is remote, and may be excluded under **McLeod -v- Threlkeld**, supra.

(2) At page 23 it is urged that cases involving roads are to be differentiated from railroad cases such as the **Pedersen** case, supra, because:

> " . . . all the railroads in the country, as this Court undoubtedly judicially knows, handle a substantial amount of interstate commerce, whether they be short lines or trunk lines."

This is disposed of by the holding in the **Overstreet** case (318 U. S. 129), placing roads and bridges on a complete parity with railroads, as respects interstate commerce.

(3) Petitioner urges strongly that the transit of the mails should be disregarded as an element of interstate commerce moving over the road, for two reasons:

(a) Because, with reference to the mails, Congress is acting under the constitutional power "to establish post offices and post roads", and not under the commerce power. This is answered by the definition of "commerce" in U. S. C. Tit. 29, Sec. 203(b), so as to include "communication among the several states". Under petitioner's theory, a shipment of war munitions from a factory in Detroit to a port of embarkation would not be subject to the regulations of the Interstate Commerce Commission because the goods were ordered and shipped under the war power of Congress.

(b) Petitioner further objects that if the carriage of the mails over the road be viewed as interstate commerce, it follows that laborers working on a path in a yard leading to a house over which the postman walks, are also within the coverage of the Act (pet. 27). This contention is but one more illustration of the fact that almost any proposition can be made ludicrous by applying it in an extreme and foolish way. There is a vast difference between the use of a toll road required by statute to be kept open for transit

at all times, and the use of a path across the private lot of a householder which is subject to no such legal obligation.

Two other decisions of this Court dealing with the Fair Labor Standards Act as applied to employees engaged in transportation merit attention; **Pickett** -v- **Union Terminal Co.**, 33 F. Supp. 244, 118 F.(2d) 328, U. S. 386; and **Overnight Motor Trans. Co.** -v- **Missel**, 316 U. S. 572.

In the Pickett case the District Court held squarely that redcaps employed in a union station to handle the hand baggage of passengers, were "engaged in commerce" and the reversal of the District Court by the Circuit Court was entirely upon other grounds. The **Pickett** case was decided in this Court as a companion case to **Williams** -v- **Jacksonville Terminal Co.**, 315 U. S. 386, and this Court did not disturb the District Court's ruling on the question of coverage.

In the **Overnight** case, supra, coverage was granted to a rate clerk employed by a company engaged in motor transportation, the decision being cited with approval in **McLeod** -v- **Threlkeld**, supra, (319 U. S. 497, foot note 14). Coverage was recognized in the case of the redcaps and of the rate clerk wholly without regard to the proportion of interstate business to the entire traffic of the carriers involved, or to what proportion of the duties of the employees involved interstate passengers or freight.

Many of petitioner's cases are decisions of district courts, among which conflict and confusion as to coverage have reigned rampant throughout the effective period of the Fair Labor Standards Act. They do not deal with "transportation" or "communication" as defined in the Act, but with "production of goods for commerce". Detailed analysis of such cases therefore would be unprofitable.

Considering both the law and the facts, the District Judge was ultra-conservative in finding as he did (R. 327,

329) that the interstate use of the road was neither occasional nor accidental. He might well have found that a substantial amount of interstate commerce moved over the road.

C. To Hold Plaintiffs Covered under the Fair Labor Standards Act Does not Invalidate the Statute.

The contention that if plaintiffs are covered the Act is unconstitutional has never been advanced before. Now it is urged as an eleventh-hour defense at pages 33-36.

It is factually unsound, because petitioner's argument is predicated upon a lack of continuity in the use of the road as an instrumentality of commerce. No such situation arises here, since, for all the purposes enumerated in our "STATEMENT OF THE CASE", supra, the use of the road was continuous.

And further, the argument is entirely unsound because, with regard to all of the federal acts dealing with interstate commerce, this Court has recognized the paramount power of Congress to protect interstate commerce regardless of the quantum. Instances may be multiplied at will, but it is enough, we think, to cite the upholding by this Court of the Fair Labor Standards Act (**United States -v- Darby**, 312 U. S. 100); of the National Labor Relations Act (**Nat. Labor Rel. Bd. -v- Jones & Laughlin S. Corp.**, 301 U. S. 1); of the power of the Interstate Commerce Commission to regulate railroad rates in intrastate commerce, as declared in the Minnesota and Wisconsin Rate Cases.

CONCLUSION

In the light of the foregoing we urge that the present application for certiorari is in the last analysis merely the attempt of an unsuccessful litigant to persuade this Court to review the tedious details of testimony in which the District Judge sat as both judge and jury, and found upon the evidence, in part conflicting, that plaintiffs had proved sufficient facts to show coverage under the Act.

The time of this Court is answerable to calls more important in the public interest, and need not be spent in considering matters of this kind. The petition should be denied.

Respectfully submitted,

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